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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JIN ZHANG, et al.,

Plaintiffs,

v.

21 Civ. 01625 (GWH)
Remote Oral Argument
and Decision

XUEYUAN HAN, et al.,

Defendants.

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New York, N.Y.
March 29, 2021
11:00 a.m.

Before:

HON. GREGORY H. WOODS,

District Judge

APPEARANCES

WONG, WONG & ASSOCIATES PC
Attorneys for Plaintiffs

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BY: MATTHEW J. SAVA
ZHENG GAO
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(The Court and all parties appearing telephonically)

THE COURT: Let me begin by taking appearances from each of the parties counsel here.

First, who is on the line for plaintiffs?

MR. WONG: Raymond Wong, attorney for the plaintiff.

THE COURT: Good. Thank you very much. And then who is on the line on behalf of the defendants?

MR. BOXER: This is Jeffery Boxer from Carter Ledyard on behalf of all the defendants other than Hengtai Securities. My colleagues Madelyn White, Meredith Spelman, and Sarah Ganley are also on the line.

THE COURT: Good. Thank you very much.

And who is on the line on behalf of Hengtai?

MR. GAO: This is Zheng Gao, attorney from Reid & Wise for defendant Hengtai. So, I think my colleague Matthew Sava, and Shiyong Yi, they are supposed to appear. So let me check whether they are here.

MR. SAVA: Yes. This is Matthew Sava with Reid & Wise. With me is Zheng Gao and Shiyong Ye.

THE COURT: Good. Thank you very much. So let me begin by saying a few brief words about the rules that I would like the parties to follow here.

At the outset, I would like everybody to please place your phones on mute. Somebody does not have their phone on mute. The person dialing in with the last four digits of 4852,

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1 for example, your line is not on mute. That is part of the
2 reason why we are hearing reverb and background noise. I am
3 going to ask everybody to please place your phones on mute.
4 Please keep them on mute at all times except when you're
5 addressing the Court or one of the other parties. If you do
6 not place your phones on mute, unfortunately, that results in
7 unnecessary background noise and reverb that can make it
8 difficult for us to hear and for the court reporter to maintain
9 a record of the conversation. So, again, please all keep your
10 phones on mute. Keep them on mute at all times except when

11 MR. SAVA: Your Honor. Yes, your Honor.

12 MR. WONG: Your Honor, I have three colleagues --

13 (Reporter interrupts)

14 THE COURT: Yes. First, the court reporter just
15 asked -- and I will get to in a moment -- can you please
16 identify yourself for the record. Let me just say now, as I
17 was about to say, one of the instructions that I want everybody
18 to follow is for everybody to please state their name each time
19 that they speak. There is a court reporter who is transcribing
20 these proceedings. She knows what I sound like, but she does
21 not know who you are based on your voice. So before saying
22 anything of substance in this conference, each speaker must
23 identify him or herself by name for the record. So, for
24 example, you would say this is Mr. Smith and then proceed to
25 make your remark.

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1 So, I'm sorry, somebody was just interjecting
2 something. Please can you identify yourself for the record?

3 MR. WONG: This is Raymond Wong, the attorney for the
4 plaintiff. I would like to make an oral motion to admit my
5 colleague for this conference, Natalya Rutchyk and Vicky Mao.

6 THE COURT: Thank you. I'm happy to take that up.
7 What do you mean by "to admit them for this conference"? Are
8 they expected to represent one of the parties during the
9 conference?

10 MR. WONG: They are representing the plaintiff team.
11 They try to admit in the normal process but they have trouble
12 getting their certificate of good standing, so they cannot be
13 admitted on time for this conference. So we are following the
14 rules trying to have them admitted on an emergency basis to be
15 part of this conference.

16 THE COURT: Thank you. Are you expecting that either
17 of them will be addressing the Court during this conference?

18 MR. WONG: I would expect Natalya Rutchyk to be
19 participating only. Paul Gilmer will be the counsel on this
20 case.

21 THE COURT: Thank you. And Mr. Gilmer is on the line.
22 Is that right?

23 MR. GILMER: Paul Gilmer speaking. That is correct,
24 your Honor.

25 THE COURT: Good. Thank you. So let me just decline

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1 to take up that application at this point. I understand that
2 the formal motion is working its way through the system. I
3 understand that lead counsel here is Mr. Gilmer, and that he is
4 prepared to address all issues. If and to the extent that
5 either of the lawyers who you just identified must speak during
6 the conference, I invite you to renew the application, but at
7 this point I don't know that it is necessary for me to step
8 outside of the ordinary process here. So lead counsel is on
9 the line and has entered an appearance.

10 Anything else, Mr. Wong, before I continue with my
11 introductory remarks?

12 MR. WONG: That's it for now, your Honor.

13 THE COURT: Thank you very much.

14 As I said at the outset, please keep your phones on
15 mute. The second thing I wanted to say is that you should all
16 remember that this is a public proceeding. Any member of the
17 public or press is welcome to join the conference at any time.
18 I am not monitoring whether third parties are joining the
19 conference, so please just keep that in mind.

20 Third, as I just informed you, my expectation is that
21 the parties' counsel will each represent or introduce
22 themselves each time that they speak. So, again, if you begin
23 any remarks, please state your name before beginning any
24 substantive remarks.

25 Fourth, I'm inviting our court reporter to let us know

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1 if she has any difficulty hearing or understanding anything
2 that we have to say today. If she asks you to do something
3 that will make it easier for her to do her job, please do it to
4 the extent that you can.

5 And, finally, I'm ordering that there be no recording
6 or rebroadcast of all or any portion of today's conference.

7 So, counsel, I scheduled this conference as a hearing
8 with respect to plaintiff's request that the Court enter an
9 order attaching certain properties of certain of the defendants
10 in this case. I anticipate taking up that application now.
11 I've also been presented with applications to file motions to
12 dismiss a number of the allegations in the complaint,
13 substantially all of them, for a variety of bases. So I'd like
14 to take up each of those issues.

15 I am going to propose a structure for this conference
16 which takes into account the fact that the bases for the
17 proposed motion to dismiss are also germane to the Court's
18 evaluation of the application for an attachment here because
19 the motions to dismiss as proposed challenge the viability of a
20 number of the plaintiff's causes of action and whether they can
21 be properly sustained in this court.

22 So what I would like to do is first ask if either
23 party wishes or set of parties wishes to present additional
24 evidence to the Court in connection with this application.
25 Then I hope to invite any supplemental argument from the

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1 parties with respect to certain of the issues, principally
2 whether and to what extent a sufficient showing of intent to
3 hide assets has been shown to support the request of attachment
4 order. Then I hope to engage in a discussion regarding the
5 anticipated and pending attacks on the substantive merit of
6 plaintiff's claims, both in order to introduce our discussion
7 for motion to dismiss, but, more importantly, for purposes of
8 this conference to inform my assessment of the application for
9 an attachment order.

10 So that is my agenda here.

11 Let me begin first with counsel for plaintiffs.

12 Counsel, do you anticipate providing any additional evidence to
13 the Court in this proceeding beyond that which was submitted in
14 your written submissions? Counsel for plaintiffs.

15 MR. GILMER: Yes. Paul Gilmer here speaking.

16 We do have a news report. It is currently not in a
17 submittable form because it is in Chinese pertaining to many
18 arrests that were made against Nuoyuan Capital, and we would
19 like to submit it perhaps after this appearance after it's been
20 translated so that we can use it to rebut some of the claims
21 from defendant's counsel regarding the level of the arrests and
22 the investigations that have been ongoing pertaining to fraud
23 by defendants.

24 THE COURT: Thank you. So I understand that at this
25 point you're not prepared to present additional evidence to the

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1 Court in support of the application. Is that right?

2 MR. GILMER: That is correct, your Honor.

3 THE COURT: Thank you. Counsel for the defendants,
4 other than Hengtai, counsel, do you anticipate presenting
5 additional evidence to the Court in connection with this
6 hearing regarding the plaintiff's request for an order of
7 attachment?

8 MR. BOXER: Jeffery Boxer speaking.

9 We do not anticipate presenting additional evidence.
10 Just to note that to the extent the plaintiffs have already
11 submitted documents in Chinese that they plan to use, we
12 reserve our right to object to that without translations of the
13 portions that they plan to use, but no additional evidence from
14 our end.

15 THE COURT: Good. Thank you very much.

16 Counsel for Hengtai, do you anticipate submitting
17 additional evidence to the court here?

18 MR. SAVA: We do not, your Honor.

19 THE COURT: Thank you very much.

20 I understand the evidentiary record in support of the
21 application is closed.

22 With that, I'd like to turn to a discussion of the
23 issues raised by the application. I've reviewed all of the
24 materials that the parties have submitted on the docket to
25 date. I've read the parties' briefing in connection with this

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1 application. My expectation at the outset is that I am not
2 going to be considering certain of the documents that were
3 presented to the Court that, as counsel has just suggested, are
4 not in the English language.

5 For example, Exhibit 28, 29, and 30, all of which have
6 no English language translation, I'm sorry, but I can't assess
7 foreign language documents.

8 I also observed that there are affidavits submitted on
9 the docket at Docket No. 27 and at Docket No. 21, each which is
10 translated but in neither case do either of those appear to be
11 certified translations.

12 Let me just check with respect to each of those two
13 documents because I'm not considering any document written in a
14 language other than English at all here. I can't understand
15 them, and nor do I expect the other parties to be able to do
16 so.

17 So, let me hear from counsel for plaintiffs. Counsel,
18 again I see the translations at Docket No. 27 and Docket No.
19 21, are those certified translations?

20 MR. GILMER: They are not certified translations as of
21 this moment, no. As of this moment any document that does not
22 have a translation, we are certainly not going to dispute not
23 being entered into the record. I believe that documents we
24 have already submitted in the English language and any
25 certified translations that we have -- any certified

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1 translations that we will provide will be in the future, but--

2 (Reporter interrupts)

3 THE COURT: Thank you. Can I ask you to please read
4 back the last portion that you heard, and then, Mr. Gilmer, if
5 you don't mind, I'd like to ask you to fill in the last remarks
6 for the benefit of the record.

7 Can I ask the court reporter to please read back up to
8 that point?

9 (Complies)

10 MR. SAVA: But I believe that the documents we filed
11 in English are more than sufficient at this moment.

12 THE COURT: Thank you very much. So I will be
13 considering the documents that have been submitted in the
14 English language including certified but not uncertified
15 translation of documents, so --

16 MR. BOXER: I'm sorry to interrupt. It's Jeffery
17 Boxer speaking.

18 But you mentioned Docket No. 21, which is actually a
19 declaration submitted by the defendants, not the plaintiff, and
20 I would like to address that because there are Chinese language
21 exhibits attached, but there are certified English translations
22 of the portions of those exhibits that are referred to in our
23 papers.

24 THE COURT: Thank you. Understood. I will be
25 considering certified translations for purposes of this

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1 hearing.

2 MR. BOXER: Thank you. Thank you.

3 THE COURT: Good. Thank you.

4 So, let's begin. Counsel at the outset, I've reviewed
5 your submissions with respect to the application for an
6 attachment order. I want to engage in a conversation
7 regarding, I'll call it, the probability of success regarding
8 the claims here. I do not think that I need additional
9 argument regarding the issues related to asserted fraudulent
10 intent. The documents presented to the Court are relatively
11 straightforward. So I'm going to ask with respect to that
12 category of information whether either party wishes to add
13 anything to supplement your arguments with respect to that
14 issue.

15 Again, I expect to engage in a more plenary discussion
16 regarding the probability of success on the merits with respect
17 to plaintiffs' claims momentarily, but I'd like to first invite
18 the parties to let me know if there is anything you'd like to
19 add to your written submissions with respect to the issue of
20 whether defendants are acting with intent to defraud as
21 required for the Court to find that attachment is appropriate
22 here.

23 Counsel for plaintiffs, is there anything you'd like
24 to add to your written submissions on that front?

25 MR. GILMER: Paul Gilmer speaking here. I believe

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1 that the submissions that we have have all been provided for
2 your Honor, especially in the amended complaint and attached
3 exhibits. Indeed, various affidavits already speak for
4 themselves. Thank you.

5 THE COURT: Very good.

6 Counsel for Hengtai.

7 MR. SAVA: Matthew Sava for Hengtai.

8 Your Honor, the plaintiffs, as we understand it, are
9 not seeking to attach any Hengtai assets and have made no
10 showing at all with respect to Hengtai. So we don't have any
11 additional evidence to submit on that point, but believe that
12 the attachment issue is largely a non-issue with respect to
13 Hengtai.

14 THE COURT: Very good.

15 Counsel for the remaining defendants.

16 MR. BOXER: Jeffery Boxer. We have no additional
17 evidence to submit on that point.

18 THE COURT: Thank you very much.

19 So let's turn to the second principal issue on which
20 I'd like to focus for purposes of discussing the or evaluating
21 the attachment order, which is the probability of success on
22 the merits. There are a number of issues that have been raised
23 in the parties' submissions, including in both the opposition
24 to the motion. They're also outlined in the pre-motion
25 letters. The first of those is the asserted failure to serve.

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1 Now, I just want to observe at the outset here that
2 only certain of the defendants' property is sought to be the
3 subject of the attachment order here. Some of the arguments
4 that are presented by defendants' counsel in your pre-motion
5 conference request letters applies to defendants who are not
6 potentially subject to the order of attachment.

7 I would like to talk about each of the issues raised,
8 however, in a broader way. I will ask that you identify
9 whether and to what extent each of these issues specifically
10 touches the defendants who are intended to be the subject of
11 the attachment order, but I want to engage in a plenary
12 conversation at this point regarding all of anticipated attacks
13 on the plaintiffs' allegations here, and I will take them up in
14 turn.

15 Again, with respect to each of these issues, I've read
16 the parties' briefing, and I've read the letter submissions in
17 connection with the proposed pre-motion conference letters.

18 So, let me just ask for the parties first to speak to
19 the asserted failure to serve these the complaint and other
20 documents here. As I understand it, defendants propose to show
21 that they were not properly served because the filings here
22 were not served directly to a corporate representative for the
23 corporate defendant; that they were left for the doorman but
24 not subsequently mailed to the individual defendants; that they
25 were left with a doorman for a building, which is not

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1 Ms. Ao's -- pardon me if I'm pronouncing that wrong --
2 residence given that she's returned to China. So I understand
3 those to be defendants' arguments regarding service.

4 Counsel for plaintiffs, let me hear from you -- let me
5 hear from you first with respect to service on the corporate
6 defendants. Why is service on the concierge at the residence
7 of the individual -- the son of the individual defendant proper
8 service on the corporate defendants?

9 MR. GILMER: So, under Rule 4 service is proper under
10 a corporate defendant if it is -- service is made upon one of
11 the officers; and in the case of all the corporate defendants
12 that we did serve, it was upon Mr. Han's residence, and it was
13 given to the concierge which, as we are all aware, is
14 considered to be an adult at the age of 18 in the residence,
15 and whether or not he resides is there is not an issue for the
16 Court.

17 I would argue that even though we have not directly
18 served him, first of all, that because of the piercing of the
19 corporate veil issue, in this case all these defendants are
20 properly served upon -- and with how many different defendants
21 there are, it would be an equitable result, and to the extent
22 we haven't made proper service, I would ask that we could make
23 an oral application or written application for alternative
24 service because many of the corporations that we are stating
25 are -- can have the corporate veil pierced are located in China

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1 and various locations.

2 But to a certain degree we have also served certain
3 corporate defendants personally; most notably, of course,
4 Hengtai, but also HF Holdings, which is a corporation which the
5 NIO stock was purchased under. We had filed an affidavit of
6 service showing that we served those -- the address in the
7 British Virgin Islands directly in that case, as well as --
8 sorry -- as well as for that party they do business in New York
9 and as far as all of the corporations that do business in New
10 York, we have also served them in the Flushing address as well.

11 (Reporter inquires)

12 MR. GILMER: As far as I'm aware, all of the
13 corporations which are doing business are New York, and I would
14 argue that all of them are doing business because Mr. Han is
15 here doing business through these corporate names. They all
16 are registered at the Flushing address.

17 THE COURT: Good. Thank you. Let me just follow up
18 on each of those things.

19 First, I understand that the individual defendant has
20 not been personally served yet, but let's focus on the service
21 on the corporate entities. First, is it sufficient in your
22 view to serve the corporation by serving it at the residence of
23 an officer?

24 MR. GILMER: So, I tried to review the case law, and I
25 was able to find one case in the Southern District of New York

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1 which did touch on this issue. It did hold that I would have
2 to serve directly on the officer. However, there were no other
3 citations of that case. I do not have the citation in mind at
4 the moment, but I also think to the effect that the corporation
5 in this case we are seeking to pierce the corporate veil, there
6 should also be an exception made as well in this case for that
7 reason.

8 THE COURT: Good. Let me just pause you on that.
9 With respect to the piercing-the-corporate-veil argument,
10 counsel, in your briefing you lay out New York law on piercing
11 the corporate veil. Why does New York law apply with respect
12 to piercing issues for these foreign companies?

13 MR. GILMER: Well, I believe that New York law would
14 apply in part because these corporations are doing business in
15 New York. They are -- I mean HFRE is registered in New York.

16 As far as the choice of law issue, I believe that
17 either New York or federal law, either one, would apply in this
18 case as far as piercing the corporate veil.

19 THE COURT: I'm sorry. Counsel for plaintiffs, just
20 to be clear, you are going to point the Court to case law that
21 states that New York law governs issues related to piercing
22 where the corporation at issue is organized and largely
23 operates in a place outside of the United States?

24 MR. GILMER: No, in that case I do believe that
25 federal law should be -- should be the judging standard

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1 especially because these corporations are transnational. You
2 have -- you have Mr. Han is running businesses out of New York,
3 but he is also doing business in China, so I do believe that
4 federal law would be more applicable in this case because you
5 do have an international scheme that is set up.

6 THE COURT: Thank you. So what precedent do you
7 expect to point me to, counsel, that supports your position
8 that a United States federal law governs internal corporate
9 governance issues with respect to corporates incorporated here
10 and in China, counsel?

11 MR. GILMER: I do not have any cases on hand at the
12 moment. I only have New York.

13 THE COURT: Thank you.

14 MR. GILMER: Sorry, your Honor.

15 THE COURT: Thank you. So a fundamental question
16 regarding your argument here is whether the Court applies U.S.
17 and New York law to any corporation regardless of where
18 organized or operating. That is an argument which I understand
19 at this point is one which plaintiffs do not have legal support
20 for.

21 Counsel, the next argument that you presented in
22 support of your argument that the agencies -- the corporations
23 were properly served is that it is, in your words, an equitable
24 result. What is the legal principle that supports the view
25 that services need not be done in a proper manner if requiring

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1 service would be inequitable?

2 MR. GILMER: I do not have any legal principle for
3 this, your Honor.

4 THE COURT: Thank you. Good. So with respect to the
5 request for alternative service, I'm happy to entertain a
6 written request for leave to undertake alternative service. As
7 you know, one of the questions that the Court will need to
8 evaluate is whether and to what extent any diligence has been
9 made to properly effectuate service. I would entertain any
10 such a request with the applicable law in mind.

11 The next issue that I'd like to look at are the
12 arguments with respect to lack of personal jurisdiction here;
13 that is, in New York. I will hear from counsel for the
14 corporate defendants, that is corporate defendants other than
15 HFRE. My understanding is that they argue that there is
16 adequate support for a 12(b)(1) motion because they do not
17 reside in or maintain any property office bank accounts or
18 employees in New York and all relevant documents and contracts
19 were executed in China by Chinese people in China, and that
20 their places of incorporation and principal places of business
21 are outside of the United States, and also that Ms. Ao is a
22 Chinese citizen and a resident there. Let me just hear briefly
23 from counsel for corporate defendants, other than Hengtai, with
24 respect to this issue.

25 Counsel, what is the basis for this motion to dismiss

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1 for want of personal jurisdiction?

2 MR. BOXER: Thank you, your Honor. Jeffery Boxer
3 speaking.

4 The basis for the motion to dismiss for lack of
5 personal jurisdiction for the corporate defendants is
6 essentially as your Honor just said: Under New York federal
7 law looks to New York State law here, with the possible
8 exception of one federal claim, which I'll discuss in a minute,
9 and so the New York long-arm statute requires a defendant to
10 have either -- the court to have either general or specific
11 jurisdiction over a particular defendant, our belief and
12 argument is that the corporate defendants, with the exception
13 of HFRE, are certainly not subject to general jurisdiction in
14 the U.S., and that the claims here do not supply specific
15 jurisdiction over these corporate defendants because they did
16 not take any action in New York, did not take any actions that
17 caused harm in New York, did not commit torts in New York or
18 meet any of the other requirements under New York's long-arm
19 statute.

20 We also expect to argue that in addition to satisfying
21 New York's jurisdictional long-arm statute, the assertion of
22 jurisdiction must satisfy due process, there must be minimum
23 required contacts so that hailing defendants into court does
24 not violate the Constitution, and we don't think that standard
25 has been met here either because these companies essentially

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1 are foreign companies doing business abroad taking investments
2 from foreign non-U.S. citizens, essentially and largely Chinese
3 citizens and residents, and that there is essentially no
4 connection to New York for those corporate defendants.

5 THE COURT: Thank you. That's fine.

6 I expect that you were about to address the securities
7 law jurisdiction issue. I'll ask you to table that and we will
8 talk about that in the context of the motion to dismiss those
9 claims because of their extraterritorial limitations on
10 applications of U.S. securities laws. I understand that
11 defendant Hengtai intends to move separately on substantially
12 the same basis.

13 Counsel for plaintiff, let me turn to you. What is
14 the basis for plaintiff's contention that the Court has
15 jurisdiction over these entities, that is, other than HFRE and
16 Mr. Han? Counsel, can you please point me to the factual basis
17 either in the complaint or otherwise that establishes a basis
18 for personal jurisdiction over Ms. Ao and those corporate
19 defendants?

20 MR. GILMER: Yes. In this case, previously I said I
21 did not have any -- any case law as far as piercing the
22 corporate veil. I do have a case to provide now which does
23 state that in the event that it can't pierce the corporate
24 veil, that the standard for obtaining personal jurisdiction
25 over these corporations becomes much simpler because the

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1 corporations are an alter ego of the individual, which would
2 certainly be true in our case as we have alleged.

3 THE COURT: Thank you. I'm sorry. So, the argument
4 is that they are an alter ego Mr. Han, and that's the sole
5 basis for the Court to find personal jurisdiction over them.
6 Is that right?

7 MR. GILMER: That is the primary basis, but not the
8 sole basis. Also, Mr. Han is the -- is an officer. He is the
9 CEO of many of the other corporations, and he resides within
10 New York. He has resided in New York since 2018. He has been
11 doing business from here as an officer of the corporation, and
12 he has in several of the investments, especially in the
13 Dingsheng and DingSei (ph) matters, were actually made after
14 Mr. Han had moved to the United States. So, for all of these
15 reasons, I believe that personal jurisdiction is proper.

16 As far as the Raelwei Sieg (ph) investments, that was
17 made in purchases in NIO on the New York Stock Exchange and so
18 that does largely deal with the Southern District of New York
19 as far as where the transactions were occurring in that action,
20 and so we believe that personal jurisdiction is proper for that
21 reason as well.

22 THE COURT: Thank you. Can you please expand on that?
23 I suggested earlier that we postpone a discussion of
24 jurisdictional issues related to securities claims, but let me
25 ask you to expand on that argument. Why is it that that

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1 transaction gives the Court personal jurisdiction over certain
2 of defendants, and which ones?

3 MR. GILMER: So your question is which corporations in
4 particular do the -- do the securities trades, do those allow
5 for personal jurisdiction over? I believe it would be Hanfor
6 Holdings and HF Holdings in particular, and those were the ones
7 that were made in connection with the New York Stock Exchange,
8 and on the basis that the New York Stock Exchange is in the
9 Southern District of New York, and so if we are seeking to
10 enjoin any of the NIO shares that have been invested, that
11 would be the proper jurisdiction for those claims.

12 THE COURT: Thank you. Let me hear from counsel for
13 the corporate defendants on this argument counsel.

14 MR. BOXER: Yes. Jeffery Boxer speaking again.

15 If I understand the arguments that were just made and
16 the one that was just made, the idea is that Ms. Zhang is the
17 only one of the defendants who invested in a company that she
18 understood would be in turn purchasing shares of a company that
19 was traded on the New York Stock Exchange, and that alone
20 subjects the company that Ms. Zhang invested in to personal
21 jurisdiction in New York. We do not believe that is the case.
22 We do not believe the case law supports the idea that investing
23 in a foreign company that in turn plans to invest in a company
24 that happens to be traded on the New York Stock Exchange is a
25 blanket submission to jurisdiction of that foreign company to

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1 the Southern District of New York.

2 THE COURT: Thank you.

3 Counsel for plaintiff, is that indeed your argument;
4 that any company that invests in stock listed on the NYSE is
5 subject to jurisdiction in this court because it holds or is
6 traded in stock that is listed here regardless of whether or
7 not the transaction issue relates to the stock held by that
8 company?

9 MR. GILMER: Not at all, your Honor. We do not think
10 that personal -- or that general jurisdiction is obtainable
11 just because stock is traded. In this case, the primary reason
12 why jurisdiction is proper in this case is because of the fact
13 that all the corporations, other than Hengtai, are in our
14 view -- and we believe that the facts suggest this are alter
15 egos of defendants Han Xueyuan. That is the primary basis for
16 this. And the fact that they are traded on the New York Stock
17 Exchange is just an additional factor of connections to this
18 forum, but it alone is not sufficient to establish
19 jurisdiction, your Honor.

20 THE COURT: Good. Thank you very much.

21 Counsel for plaintiff, what's the basis for personal
22 jurisdiction over Ms. Ao? As I understand the assertions by
23 defendants, she does not currently reside in New York. She
24 resides in China. Why does this Court have personal
25 jurisdiction over her?

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1 MR. GILMER: Based off of her affidavit or her
2 declaration, rather, she stated that she is a -- only a
3 resident in China. However, she spent the majority of last
4 year within the United States. Her children live in United
5 States, so -- and a party is able to have more than one
6 residence, so there is -- I believe that she does also reside
7 here especially after having spent such a long time at the
8 residence of her children, and at the very least, it would be a
9 frequent place of abode, so therefore service should be held
10 proper over Ms. Ao.

11 THE COURT: Thank you.

12 My understanding was that she asserts she was stuck in
13 the United States because of COVID; that she'd originally
14 planned on a shorter trip. So, counsel, how does that affect
15 your analysis?

16 MR. GILMER: Yes. I mean, certainly we took here at
17 that word that that may be the case, but we believe that those
18 remarks are in general self-serving as an attempt to avoid
19 jurisdiction, especially because she also stated that when
20 she -- in her declaration that when she was coming here, she
21 was looking for business opportunities, as well her children
22 are here, she was looking for educational opportunities.

23 So, you know, she -- when she came here in the first
24 place, it was before -- I believe it was before she could have
25 imagined that COVID would have happened. Just simply because

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1 she says that is not where she would be staying and it would be
2 her residence, that does not mean it's not her frequent place
3 of abode given that her children are here.

4 THE COURT: Thank you. I expect that you have case
5 law that supports that position, counsel, that somebody who is
6 in the United States for a period of time, whose children live
7 here, remain subject to U.S. jurisdiction for some portion of
8 time after that? What point in your view of the law, counsel
9 for plaintiffs, does a person stop being subject to U.S. law
10 under these circumstances?

11 MR. GILMER: I do not have the case law right in front
12 of me. I believe though at least for now, because she spent
13 more than half of the year within the United States, she would
14 be -- she would have been considered a resident for these
15 purposes.

16 THE COURT: Good. Thank you very much.

17 So let's turn to the issues related to arbitration
18 here. The defendants have pointed me to provisions of the
19 share purchase agreements. They intend to move to dismiss and
20 to compel arbitration on that basis. They have pointed me in
21 particular to Article 16 of the Purchase Agreement at Docket
22 21-7, which states in sum that all disputes should first be
23 resolved through negotiation. Then if the relevant party
24 cannot resolve the matter through negotiation, the matter
25 "shall be submitted to the Beijing Arbitration Commission and a

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1 award will be made in Beijing in accordance with the then
2 effective arbitration rules."

3 So, let me hear from each of the parties on this
4 issue. First, counsel for defendants other than Hengtai, what
5 is the basis for this motion which I understand to be a motion
6 to compel arbitration and to dismiss the case. You're not
7 requesting a stay pending arbitration. Counsel for those
8 defendants, what's the basis for this motion?

9 MR. BOXER: Thank you, your Honor. Jeffery Boxer
10 speaking again.

11 Your Honor, the motion is -- the basis for the motion
12 is essentially as you just said: Each of the plaintiffs here
13 admitted that they -- allege that they signed specific
14 agreements relating to each of the seven investments. Each of
15 the plaintiffs bring claims based on those particular
16 investments, and in fact breaches of those particular
17 agreements, and each of those agreements contains arbitration
18 provisions that are quite clear and broad, requiring any
19 disputes relating to or arising out of those agreements to be
20 arbitrated before the Beijing Arbitration Commission in
21 Beijing, China. The federal law we think is fairly clear that
22 those provisions are binding; that arbitration is favored; and
23 that claims that should be brought in arbitration should not be
24 heard in this or any other court.

25 THE COURT: Thank you. Counsel for defendants,

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1 counsel for plaintiff has made an argument that issues of
2 arbitrability should be resolved by the Court. What is your
3 view regarding whether the language of these contracts empowers
4 the arbitrator to decide issues of arbitrability?

5 MR. BOXER: So in our anticipated motion, we expect to
6 refer to the rules of the Beijing Arbitration Commission, which
7 provide that the arbitrators have the power to determine their
8 jurisdiction and arbitrability, and we expect to argue that in
9 those cases by the parties adopting those rules, they have
10 agreed to give that power to the arbitrator, not the courts.
11 But, nonetheless, if the Court had the authority to make the
12 decision, the decision in our view should still be in favor of
13 arbitration.

14 THE COURT: Good. Thank you very much.

15 Let me turn to counsel for plaintiffs. Counsel, why
16 is this provision of each of the relevant purchase agreements
17 not applicable here?

18 MR. GILMER: Your Honor, we believe that this is a
19 case of first impression. The reason, quite frankly, why these
20 claims have not been brought in China is because our clients
21 have attempted to bring these claims in China, but because of
22 ongoing criminal investigations, they have not been able to
23 proceed in the arbitration court. As a result, the arbitration
24 courts cannot move on the claims because the defendant,
25 specifically Han Xueyuan, is located within the United States,

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1 and so the criminal action is not proceeding, but it also has
2 not gone away, so we are simply unable to get any -- my client
3 is unable to obtain any sort of relief in the location where
4 arbitration is -- has been selected.

5 Furthermore, we would say that when those clauses were
6 put in there, it was done fraudulently because the defendant
7 knew that he was planning to be able to evade the jurisdiction
8 of the court by being able to leave China, and so therefore it
9 was obtained fraudulently for that reason as well.

10 THE COURT: I'm sorry. Give me just a moment.
11 Counsel for plaintiffs, just briefly, I just want to confirm
12 what I understand you to have just said. Is it your assertion
13 to the Court that the plaintiffs did submit this matter to the
14 Beijing Arbitration Commission?

15 MR. GILMER: I believe that they attempted to do so
16 through a law firm, and they were unable to submit it. I could
17 get further details certainly. I do have some reports that I
18 can submit as exhibits that would back up this claim.

19 THE COURT: Thank you.

20 So, to be clear, is it your assertion to the Court
21 that the plaintiffs submitted this matter to the Beijing
22 Arbitration Commission and the Beijing Arbitration Commission
23 declined to pursue it because of the asserted criminal
24 proceedings against Mr. Han there?

25 MR. GILMER: No, your Honor. Actually, it was that

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1 they attempted to retain service to file such a claim, but the
2 law firms there said that there was no prospect in doing so
3 because of a criminal investigation. So it never even got to
4 the phase of being able to submit it because the law firm
5 stated that it was -- it would be fruitless.

6 THE COURT: Thank you. To be clear, they did not
7 submit it to the Beijing Arbitration Commission. Is that
8 correct?

9 MR. GILMER: That is correct.

10 THE COURT: Thank you.

11 Instead, as I understand the proffer, they chose not
12 to do so on the basis that some advice rendered by counsel that
13 that forum -- sorry -- let me just finish the thought. My
14 understanding is that they chose not to the pursue a proceeding
15 in the Beijing Arbitration Commission because of advice that
16 that forum would not be amenable or a convenient place for the
17 action to take place resulting in the action proceeding here.

18 Is there any more information regarding this issue
19 that I should be aware of in considering both the anticipated
20 motion and the application for attachment?

21 MR. GILMER: Yes, your Honor. I've submitted that
22 it's not where they chose not to; that the law firm told them
23 they couldn't. It's that they are unable to. It is an issue
24 where they are -- you know, Black Letter Law, they are not able
25 to submit it because of the ongoing criminal investigation.

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1 THE COURT: Thank you.

2 I'm sorry. The ongoing criminal investigation against
3 whom?

4 MR. GILMER: It does -- well, that is part of the
5 issue is that within China, who is being criminally
6 investigated is not an open matter. It's not disclosed.
7 Primarily, it is against Nuoyuan Capital, but it is also
8 against Han Xueyuan as well, and he has already been indicted
9 for insider trading in China, for example, in connection with
10 these investigations.

11 THE COURT: Thank you. Fine.

12 Counsel, any other arguments related to the
13 arbitrability issue here? You've heard counsel for defendants
14 assert that under the arbitral rules of the Beijing Arbitration
15 Commission issues of arbitrability are reserved for the
16 arbitrator. Do you have any information for the Court with
17 respect to that issue?

18 MR. GILMER: I do not, your Honor.

19 THE COURT: Thank you. Very good.

20 Counsel for corporate defendants for Hengtai, anything
21 else on this issue at this time?

22 MR. BOXER: Jeffery Boxer, your Honor.

23 Just to add that we can address some of the issues
24 that were first raised by plaintiff's counsel just now, which
25 we're hearing about for the first time, including that they

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1 claim to have attempted to start arbitration, in more detail
2 once we explore it further. We are a little confused about how
3 a Chinese law firm can say you can't file an arbitration when
4 there's an investigation pending, but they've also said that
5 the investigations are secret or confidential. It's not clear
6 who the investigations are against or how broad a prohibition,
7 if any, that would result in. So we can address all of those
8 once we have been able to give it more attention.

9 THE COURT: Fine. Thank you very much.

10 So, counsel for plaintiff, you described this as an
11 issue of first impression. What is the, I'll call it,
12 governing principal that would lead the Court not to apply this
13 provision of the parties' agreements because of the constraints
14 that you have described? In other words, that there are
15 limitations on the chosen forum to certify a party. Why would
16 that lead the Court not to enforce the parties' agreement
17 regarding choice of forum, especially in light of the Supreme
18 Court's decisions in *Green Tree* and the like? Counsel?

19 MR. GILMER: I believe there are several cases what
20 stand for the matter that if there has been a party that -- if
21 there has been an issue that cannot be litigated elsewhere,
22 then if one jurisdiction has significant connections to the
23 matter, and it is in a place where some, at least, you know,
24 for busy reasons or subject matter reasons and personal
25 jurisdiction is obtained, then it can proceed in that

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1 jurisdiction. And it essentially is an equitable argument that
2 to hold otherwise would mean that this party would not be able
3 to be held liable in any other jurisdiction.

4 THE COURT: Thank you. So if a foreign country does
5 not provide a litigant with the relief that they seek, then the
6 United States courts become the *de facto* backstop for those
7 foreign jurisdictions' deficits. I look forward to seeing the
8 case law that supports that proposition.

9 MR. GILMER: Well --

10 THE COURT: Let me turn to counsel for defendants
11 regarding the *forum non conveniens* argument. Counsel for the
12 corporate defendants, why do you argue that the Southern
13 District of New York is not a convenient forum for the conduct
14 that you seek.

15 MR. BOXER: Jeffery Boxer again, your Honor.

16 So, our views on *forum non conveniens* are a couple of
17 things: One, the vast majority of documents, witnesses,
18 underlying events are either in Chinese or in China. That
19 said, we have been looking at the plaintiffs' cases and we may
20 choose to revisit the *forum non conveniens* aspect of our
21 anticipated motion.

22 THE COURT: Thank you. Good. There are a number of
23 issues there. You note many of the documents were written in
24 Chinese. At least two of the plaintiffs are foreign residents.
25 You suggested there may be difficulty in conducting discovery

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1 here. In any event, I look forward to evaluating any motion
2 brought on this basis, if one is brought.

3 So, let's turn to the issues related to asserted
4 failure to state a claim both under Rule 8 and in particular
5 under Rule 9(b) with respect to the fraud claims under Rule
6 10b-5 and civil RICO, which plaintiff asserts applies to these
7 transactions, which appear to have largely occurred outside of
8 the United States.

9 Let me hear from counsel for defendants. Counsel,
10 what's the basis for your anticipated motions to dismiss for
11 failure to state a claim, particularly with respect to the
12 federal causes of action that is the civil RICO and securities
13 fraud claims. Counsel?

14 MR. BOXER: Thank you. Jeffery Boxer again.

15 As your Honor noted, one prong of that anticipated
16 motion to dismiss is for failure to plead fraud with required
17 particularity and that applies to both the federal claims as
18 well as the state law fraud claims. We think that we will be
19 able to show that the law requires real specificity in terms of
20 pleading these types of claims. If there was something, a
21 material misrepresentation that was made, the plaintiffs need
22 to plead exactly who made it, when it was made, what was false
23 about it. And the pleading to date fails to do that. The
24 pleading contains generalities of, you know, defendants are
25 lumped together as a large group of a dozen or so defendants,

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1 or people acting on their behalf said these things.

2 There's no specificity about who said them. There's
3 no specific connection to any particular defendant, which we
4 believe is required for a fraud or securities fraud claim of
5 this type. There is no specificity about exactly when the
6 statements were made. So we think that alone requires
7 dismissal on failure to plead fraud with particularity grounds.

8 As already mentioned, and I don't know that you want
9 me to discuss it again, the federal claims we think have issues
10 of extraterritorial application of U.S. law under, for example,
11 the *Morrison* Supreme Court case where the investments and
12 injuries all took place outside of the United States in a
13 foreign country pursuant to meetings and discussions that were
14 held outside of the United States and documents that were
15 signed in a foreign language that confirm that the plaintiff
16 investors at the time were residing in a foreign country, and
17 were investing in foreign companies does not allow for a
18 securities fraud or civil RICO case in the United States.

19 THE COURT: Thank you.

20 Counsel for plaintiff, let me turn to you first on
21 these federal causes of action. Can you address first the
22 extraterritoriality concerns that have been articulated by
23 counsel for defendants? What's the basis for you to seek to
24 apply federal RICO and securities fraud laws to these
25 transactions? Counsel for plaintiffs?

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1 MR. GILMER: Paul Gilmer speaking.

2 First of all, the investment of the New York stock has
3 never been returned to my client, I believe that that is the
4 basis for the securities fraud in the first place.

5 As far as the RICO claim, Mr. Han has been within the
6 United States since 2018, and as stated previously, he is the
7 alter ego of these corporations, and he has been holding
8 investor meetings. He's been talking to many people, including
9 our clients, from the United States, either directly or
10 indirectly, and phone and emails and holding investor meetings.
11 So we believe that is the basis for why these claims are not
12 extraterritorial

13 THE COURT: Thank you. I'm sorry, to be clear, with
14 respect to the RICO claim, what wire communications within the
15 United States occurred in connection with the asserted fraud?
16 I understand that you're saying that he has since moving here
17 communicated by phone and email from New York. How is that
18 tethered to the alleged fraud?

19 MR. GILMER: Because he has been communicating -- I
20 don't have the specific communications in front of me at the
21 moment, but he has been communicating with regards to the fact
22 that several of the investments he is trying to stall in terms
23 of not paying back investments. He has sent out several emails
24 which we can attach as exhibits after this call, where he is
25 attempting to assure investors that their investments are still

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1 going to be repaid, when in fact, according to our allegations,
2 they will not be.

3 THE COURT: Thank you. Did any of these
4 communications take place prior to the date of the relevant
5 investments, counsel?

6 MR. GILMER: I believe that -- I do not believe that
7 any of them were made prior to, only subsequent to the
8 investment. So there is the initial signing, but several --
9 I'd have to check it. I believe several of them may be before
10 certain amounts of money were invested but after the agreements
11 were made. I'd have to check on that very issue though.

12 THE COURT: Thank you.

13 Of course, the Supreme Court and Second Circuit have
14 spoken to this issue in *RJR Nabisco* case and the *Elsaca* case in
15 our circuit. It's very clear that wire fraud does not have an
16 extraterritorial reach and can only be applied to domestic
17 conduct.

18 Counsel, you referred to the investment in the NIO
19 stock as the basis for the securities fraud claims. Counsel
20 for plaintiff, can you expand on those remarks?

21 MR. GILMER: Yes. So, the initial investment was made
22 by the company HF Holdings Limited, which is a corporation that
23 is based in the British Virgin Islands. And so the initial
24 investment agreement which was made in English, it was --
25 essentially what would happen is that the HF Holdings and

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1 Hanfor Holdings would both act as managers for the stock that
2 was to be purchased in the United States on behalf of the
3 plaintiff who in this case is Jin Zhang. However, instead of
4 acting as a manager for the stock, they simply purchased a
5 large amount of stock and then my client has seen nothing of it
6 since then. And this was through a parent company called
7 NDXTEZ, N-D-X-T-E-Z, and so on that basis we believe that there
8 was fraud that occurred involving U.S. investment because this
9 corporation stated it would act as a manager for the fund and
10 has failed to do so and has failed to provide any accounting
11 for where the funds have been after they were purchased in the
12 United States.

13 THE COURT: Thank you. Just to be clear, the
14 plaintiffs did not directly invest in U.S. securities. Is that
15 right?

16 MR. GILMER: They entered into an agreement to
17 directly invest in American securities, but the actual
18 investment was being done by other corporations on their
19 behalf. That's what the agreement stated is that they would
20 invest in this NIO stock.

21 THE COURT: Thank you. Again, I look forward to
22 seeing the case law that supports this position; in other
23 words, that a person that invests in an investment manager
24 company, which is in turn going to invest in U.S. securities is
25 engaged in a U.S. securities transaction by virtue of that

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1 investment in that foreign country -- sorry -- foreign
2 country-based company. Again, I very much look forward to
3 seeing the case law that supports a non-frivolous argument in
4 support of this.

5 Let me turn to the state law claims. At the outset,
6 counsel for plaintiff, you state a number of causes of action
7 under New York State law; for example, for breach of fiduciary
8 duty and otherwise. Counsel intends to move to dismiss those
9 for a variety of bases, which I will turn to in a moment, but
10 counsel for plaintiff, I would like to turn to you at the
11 outset to understand the choice of law issue here. Why does
12 New York law govern any of these claims?

13 So, for example, I understand these to be not New York
14 law-governed documents. So why would the New York law breach
15 of the duty of good faith and fair dealing apply to them? I
16 understand these to be non-U.S. companies. Why does New York
17 law apply to breach of fiduciary duty claims with respect to
18 those companies?

19 Counsel for plaintiffs, why are you asking the Court
20 to apply New York law to non-New York law governed documents,
21 and why are you asking the Court to apply New York law to
22 internal government's issues with respect to entities organized
23 outside of this state, indeed, in foreign countries. Counsel
24 for plaintiffs?

25 MR. GILMER: I think the most general argument would

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1 just be that Han is in New York, that most of his corporate
2 assets are contained in New York for at least the NIO
3 investment, and in general there is a good faith and fair
4 dealing that is attributed to every contract I believe in
5 pretty much every jurisdiction, which would include China as
6 well.

7 THE COURT: Thank you. So, to be clear, you're
8 asking -- are you bringing a claim for breach of the duty of
9 good faith and fair dealing under New York law with respect to
10 these foreign law governed documents or have you signed the
11 complaint under Rule 11 asserting that there is an equivalent
12 claim under foreign law, which I assume would require prior
13 research before -- regarding the underlying law before
14 presenting it to the Court. Counsel for plaintiffs?

15 MR. GILMER: We would certainly do any underlying
16 research that would be necessary under Rule 11 to bring it
17 before the Court.

18 THE COURT: Good. Thank you.

19 So what's the relevant law that governs breach of the
20 duty of good faith and fair dealing with respect to the
21 contracts at issue here?

22 MR. GILMER: I do not have it with me presently.

23 THE COURT: Thank you.

24 So, counsel, what is the relevant law that governs the
25 breach of fiduciary duty claims with respect to breach of

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1 fiduciary duty, as I understand it, that is representative of
2 these corporate entities which are organized, and, as I
3 understand it, largely operate outside of the United States.
4 What law are you asking the Court to apply with respect to
5 those claims?

6 MR. GILMER: I believe that we would be asking for
7 them to apply New York laws based off of the principle that Han
8 Xueyuan has been acting as the principal of all of these
9 organizations. He's been located in the United States since
10 2018, and the fiduciary duties that have been breached had been
11 while he was located in this country. And as --

12 THE COURT: Thank you.

13 So, counsel, what's the case law that you expect to
14 point me to on that issue? Let me just make it very clear.
15 Certain of these are entities that are organized outside of the
16 United States -- the Caribbean, for example. Why is it that
17 the issue of whether or not a director of that entity has acted
18 in accordance with their fiduciary duty is governed by New York
19 law rather than the law of the jurisdiction of organization of
20 the entity? Counsel.

21 MR. GILMER: I do not have such law with me at this
22 moment. To the degree we can apply law from other
23 jurisdictions, I will bring such law with me, your Honor, when
24 we are arguing the full motion on these claims.

25 THE COURT: Thank you.

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1 Let me turn to counsel, first for the defendant other
2 than Hengtai. Counsel, what can you tell me about the
3 anticipated motions with respect to the state law claims which,
4 as I understand it, are asserted to be claims under New York
5 law, which I think we just established counsel for plaintiffs
6 does not have the case law in hand supporting the proposition
7 that the equivalent claims should be governed by New York law
8 given applicable conflict principles.

9 Counsel for defendants, what can you tell me about
10 your anticipated motions to dismiss these claims? Counsel?

11 MR. BOXER: Yes, your Honor. Jeffery Boxer again.

12 So we anticipate moving to dismiss what we call the
13 state law claims, everything other than the two federal claims,
14 on a variety of grounds. There is the assumption that seems to
15 have been made previously by the plaintiffs that New York law
16 would apply, and we do expect to challenge that, particularly
17 as it relates to contract claims or claims arising out of
18 events that happened in China among Chinese residents in
19 Chinese or British Virgin Islands companies relating to
20 contract that have choice of law provisions, all of which are
21 providing for a forum of law other than New York or the United
22 States, and also even if somehow New York law did apply, simply
23 because Mr. Han was present in the United States for the last
24 year or two, that they failed to state a claim even under New
25 York law for breach of contract, breach of the duty of good

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1 faith, fair dealing or any of the other state law claims that
2 they assert. And we see no evidence that the laws of the
3 British Virgin Islands or China support similar claims in the
4 same way New York law would do.

5 THE COURT: Good. Thank you very much.

6 Counsel for plaintiff, I will invite you to consider
7 carefully the allegations that you purport to bring under New
8 York State law with an eye towards relevant conflict principles
9 and questions of whether or not the internal governments of
10 foreign country companies is properly evaluated under New York
11 law, flip the tables and ask yourselves whether you believe
12 that a New York corporation's officer's fiduciary duties are
13 governed by Chinese law when an officer happens to be located
14 there. That is the position that you are taking here. And,
15 again, any position taken before the Court must be not
16 frivolous or supported by a non-frivolous basis in order for it
17 to be justified under Rule 11. Just a note that there are
18 substantial questions regarding the nature of certain of these
19 allegations and whether or not they're supported by
20 non-frivolous basis and law.

21 In that regard, let me turn to the civil conspiracy to
22 commit fraud claim. Counsel for plaintiff, defendants have
23 suggested that they anticipate moving to dismiss that claim
24 because New York does not recognize such a claim. What is your
25 position regarding that issue?

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1 MR. GILMER: To the degree that is an accurate
2 statement, we certainly would amend that complaint to get rid
3 of civil conspiracy, if that is the case.

4 THE COURT: Good. So, I hope that the parties will
5 engage deeply with the relevant legal principles as this case
6 is developing to ensure that documents and arguments presented
7 to the Court are supported by applicable law.

8 Thank you very much, counsel. What I would like to do
9 is suggest we take a very short break, about a five-minute
10 break just to give me the opportunity to collect my thoughts,
11 having heard your arguments. Then I will come back and rule on
12 the issues presented here.

13 Counsel for Hengtai before I do that, let me turn back
14 to you. I've invited the other corporate defendants' counsel
15 to remark on each of these issues. I did that thinking that it
16 would be an efficient way to proceed, but I don't want to
17 deprive you of the opportunity to make any remarks with respect
18 to any of the issues presented here. So before we take this
19 short recess, is there anything that you would like to add with
20 respect to any of the substantive arguments that we've just
21 discussed?

22 MR. SAVA: Matthew Sava for Hengtai.

23 I concur with Mr. Boxer's arguments. The only
24 additional points I would make that are specific to Hengtai:
25 On personal jurisdiction, plaintiff's counsel acknowledged that

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1 they were not alleging the alter ego basis for jurisdiction
2 against Hengtai, and so there is really no basis whatsoever for
3 personal jurisdiction against Hengtai. The project number one
4 allegations relating to New York Stock Exchange are
5 inapplicable to Hengtai. They are not alleged to have been
6 involved in that transaction. Hengtai has no presence in New
7 York. At no time acts at all giving rise to any of the claims
8 here, according to plaintiffs own allegations.

9 On the arbitration issue, we would agree that the
10 arbitrator is the proper party to determine arbitrability. In
11 any event, the claims against Hengtai are two. There are
12 breach of contract claims and breach of fiduciary duty claims.
13 Those claims directly arise out of the contract. The breach of
14 contracts claims by definition arise from the contracts that
15 have the arbitration provisions, and the fiduciary duty claims
16 as alleged against Hengtai, which Hengtai denies, are alleged
17 by plaintiffs to arise out of the contract. They allege in the
18 complaint that the fiduciary duties were created by the
19 contract. So those claims are inarguably within scope of the
20 arbitration provision.

21 The argument that a parallel criminal proceeding bars
22 an arbitration, even if that's correct, which we are advised
23 it's not correct, but even if that was correct, it has nothing
24 to do with Hengtai. Hengtai is not the subject of any criminal
25 investigation in China. And so, if the plaintiffs truly had

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1 claims against Hengtai, those claims are required by the
2 contract they signed to be submitted to arbitration in Beijing.

3 And otherwise we concur with all of Mr. Boxer's
4 arguments.

5 THE COURT: Good. Thank you very much.

6 Let me turn back briefly to counsel for plaintiffs
7 regarding Hengtai's arguments. I will just invite comment in
8 particular regarding the last of those remarks. Counsel for
9 plaintiffs, can I just hear from you regarding what the basis
10 is for your assertion that the arbitration provision does not
11 apply to Hengtai?

12 MR. GILMER: My understanding is that because the
13 entire matter of the investments is being investigated
14 criminally, every aspect is not subject to arbitration. I can
15 certainly confirm that with my client and their Chinese
16 counsel as well to see if that is correct or not.

17 THE COURT: Very good. Thank you very much.

18 Counsel, thank you very much for your arguments. Let
19 me propose that we take a short recess until, say, 12:30. Then
20 I will come back and hope to deliver my decision. I'll place
21 you all on mute. Don't hang up. But please place your devices
22 on mute. Let's plan to start promptly 5 minutes from now at
23 12:30. Thank you all very much.

24 (Recess)

25 THE COURT: Is counsel for plaintiff on the line?

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1 MR. GILMER: Yes, your Honor.

2 THE COURT: Good. Thank you very much.

3 Is counsel for Hengtai on the line?

4 MR. SAVA: Yes, your Honor.

5 THE COURT: Thank you. Again, please identify
6 yourself just for the sake of the record. So, actually, that
7 was Mr. Gilmer for plaintiffs.

8 Who is speaking for defendant, Hengtai?

9 MR. SAVA: Matthew Sava.

10 THE COURT: Good. Thank you.

11 Counsel for the remaining defendants.

12 MR. BOXER: Yes. It's Jeff Boxer. We are here.

13

14 THE COURT: Good. Thank you very much. So thank you
15 very much for your participation in the discussion that we just
16 had regarding the anticipated motion to dismiss and also the
17 application for the order of attachment.

18 I'm going to rule on each of those issues now
19 beginning with the application for the order of attachment.
20 Please place your phones on mute as I get through my analysis
21 of the order of attachment and then turn to discussion of
22 schedule for the pre-motion conference.

23 So, let me begin with:

24 I. Introduction

25 I have scheduled this hearing to discuss Plaintiffs'

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1 application for an order of attachment and to discuss
2 Defendants' requests for a pre-motion conference on their
3 proposed motions to dismiss. As an initial note, on March 26,
4 2021, the parties informed the Court that Plaintiffs had filed
5 on the public docket a document containing sensitive
6 information about defendant Mr. Han. The Court has
7 provisionally sealed the document and requested that the Clerk
8 strike that exhibit from the docket.

9 As I said earlier, the Court has reviewed the
10 materials submitted by the parties on the docket. I am
11 considering all of the English-language documents and also the
12 certified translations of documents that have been presented to
13 the Court in foreign languages. The Court assumes the parties'
14 familiarity with the underlying facts. I am prepared to rule
15 on Plaintiffs' application for an order of attachment, and I
16 will do so orally.

17 II. Background

18 Between December 2016 and December 2018, Plaintiffs
19 entered into eight Investment Agreements with defendant Xueyuan
20 Han and defendant companies Hanfor Capital, Hanfor Holdings,
21 and Nuoyuan Capital. Am. Compl. ¶ 39; Zhang Aff. Ex. F.
22 Plaintiffs have invested more than 98.1 RMB (about \$14 million
23 USD), but claim that they never received any proceeds from the
24 equity shares, nor were their initial investments ever
25 returned, despite contacting Mr. Han. Am. Compl. ¶ 73, 94, 113,

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1 125, 145, 164. Plaintiffs allege that Defendants transferred
2 their investment funds into a shell company and commingled the
3 cash investments from the investors with the shell company's
4 corporate assets, and that Mr. Han has converted the funds for
5 his personal use. *Id.* at 14.

6 For example, and particularly relevant to Plaintiffs'
7 application, is HF Holdings, Limited ("HF Holdings"), which is
8 wholly owned by Mr. Han. Plaintiffs assert that HF Holdings
9 acquired 2,574,003 Class C Shares of NIO Inc. for consideration
10 of \$10 million USD in or around April 2017. This purchase was
11 made on behalf of investors in Mr. Han's projects, pursuant to
12 the investment agreement entered into as part of the Ruili
13 Weixing Project. Through that project, Defendants promised to
14 purchase on behalf of investors shares of NIO, Inc., a
15 corporate entity involved in the development and production of
16 electric vehicles, in order to provide proceeds to investors.

17
18 Plaintiffs allege that Mr. Han fled to the United
19 States in 2018 to avoid being arrested by Chinese legal
20 authorities. *Id.* In 2019, the China Securities Regulation
21 Commission Beijing Bureau launched investigations into Nuoyuan
22 Capital Management Company Ltd. for illegally soliciting public
23 cash deposits. Dkt. No. 27 ¶ 11. A representative from Nuoyuan
24 Capital was arrested. On December 29, 2020, the Chinese
25 Securities Regulatory Commission (hereinafter "CSRC") issued an

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1 administrative penalty decision against Mr. Han, finding that
2 he had engaged in insider trading. Dkt. No. 27 ¶ 12; 27-5. In
3 response, Mr. Han maintains that he moved to the United States
4 in September 2018 to “pursue various business opportunities.”
5 Han Decl. ¶ 2, and the complaint alleges that in October 2018,
6 there were reports in the media that Hanfor Capital was
7 preparing to be listed on the New York Stock Exchange. Am.
8 Compl. ¶ 29. In September 2019, Mr. Han purchased the Rector
9 Place property, a residential penthouse condominium, for \$4.99
10 million. In August 2020, Mr. Han purchased the Third Avenue
11 property, a residential penthouse condominium, for \$2.19
12 million. Mr. Han is also the registrant of a 2020 Rolls Royce
13 Cullinan, which was purchased in 2019 and is valued at
14 \$330,000.

15 On February 24, 2021, Plaintiffs initiated this
16 action, seeking the promised returns on their investments, and
17 assert that Defendants owe Plaintiffs nearly \$46 million. *Id.*
18 Plaintiffs have brought nine causes of action, including claims
19 for breach of contract, breach of the duties of good faith and
20 fair dealing, fraud, unjust enrichment, conversion, civil
21 conspiracy to commit fraud, breach of fiduciary duties,
22 violation of Rule 10b-5 of the Securities and Exchange Act of
23 1934, and conspiracy to violate the federal civil RICO statute,
24 18 U.S.C. 1962. See Am. Compl. Along with their complaint,
25 Plaintiffs moved ex parte for a temporary restraining order and

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1 an order of attachment. The Court denied Plaintiffs' ex parte
2 application for a temporary restraining order because the
3 application failed to satisfy Fed. R. Civ. P. 65's requirement
4 that "the movant's attorney certify in writing any efforts made
5 to give notice and the reasons why it should not be required."
6 No such affidavit was attached to Plaintiffs' application.
7 Thus, the Court denied the request, directed Plaintiffs to
8 serve the application and the Court's order on Defendants, and
9 set a briefing schedule and hearing date for the application
10 for the order of attachment. On February 25, 2021, Plaintiffs
11 amended their complaint.

12 Plaintiffs seek an order of attachment for (1) Mr.
13 Han's Rector Place apartment; (2) Mr. Han and Ms. Feng's Third
14 Avenue apartment; (3) Mr. Han's Rolls Royce; and (4) the
15 2,574,003 Class C Shares of NIO Inc., held by HF Holdings. See
16 Mot. at 5. So, on March 19, 2021, Defendants Xueyuan Han ("Mr.
17 Han"), Hanfor Holdings Co. Ltd., HF Holdings Limited, Hanfor
18 Capital Management Co. Ltd., Nuoyuan Capital Management Company
19 Ltd., George Xu (Mr. Xu), Junjun Feng ("Ms. Feng"), Wennan AO
20 ("Ms. Ao"), BZ Industrial (China), BZ Industrial (Virgin
21 Islands), BZ Industrial (Cayman Islands), Hanfor (Cayman)
22 Limited, HFRE LLC ("HFRE"), HF Capital Management Cay Inc., and
23 HF Cosmopolitan Beta LP opposed Plaintiffs' application to
24 attach their assets and requested a pre-motion conference to
25 discuss their proposed motion to dismiss the amended complaint.

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1 Dkt. Nos. 19–25. The Court granted Defendants’ request for a
2 pre-motion conference and informed the parties that they should
3 be prepared to discuss the proposed motion during today’s
4 hearing. Dkt. No. 26. On March 23, 2021, Plaintiffs submitted
5 a reply in support of their application for an order of
6 attachment. Dkt. Nos. 27–31. On March 24, 2021, Defendant
7 Hengtai Securities Co. Ltd. (“Hengtai”) requested a pre-motion
8 conference to discuss its proposed motion to dismiss. Dkt. No.
9 32. The Court granted Hengtai’s request for a pre-motion
10 conference and informed the parties that they should be
11 prepared to discuss the proposed motion during today’s hearing.
12 Dkt. No. 33.

13 III. Legal Standard

14 Fed. R. Civ. P. 64 authorizes a federal court to issue
15 an order of attachment pursuant to the law of the state in
16 which the district court sits. In New York, the issuance of an
17 attachment order is governed by New York’s Civil Practice Law
18 and Rules (“CPLR”) 6201 and 6212.

19 Under CPLR 6212, “on a motion for an order of
20 attachment, or for an order to confirm an order of attachment,
21 the plaintiff shall show, by affidavit and such other written
22 evidence as may be submitted, (1) that there is a cause of
23 action, (2) that it is probable that the plaintiff will succeed
24 on the merits, (3) that one or more grounds for attachment
25 provided in Section 6201 exist, and (4) that the amount

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1 demanded from the defendant exceeds all counterclaims known to
2 the plaintiff.” N.Y. CPLR 6212(a). In addition to determining
3 whether a statutory ground for attachment exists, and whether
4 the applicant has established a likelihood of success on the
5 merits, a court must determine whether the remedy “‘is needed
6 to secure payment or obtain jurisdiction,’ and it retains
7 discretion only to the extent that these determinations require
8 weighing of evidence and also in balancing competing
9 considerations.” *Mishcon de Reya N.Y. LLP v. Grail*
10 *Semiconductor, Inc.*, 2011 WL 6957595, at *3 (S.D.N.Y. Dec. 28,
11 2011) (internal quotation marks omitted) (quoting *Cap. Ventures*
12 *Int’l v. Republic of Argentina*, 443 F.3d 214, 222 (2d Cir.
13 2006)). “There must be more than a showing that attachment
14 would, in essence, be ‘helpful.’” *VisionChina Media Inc., v.*
15 *Shareholder Representative Svrs., LLC*, 967 N.Y.S.2d 338, 346
16 (N.Y. App. Div. 2013) (quoting *Founders Ins. Co. v. Everest*
17 *Nat’l Ins. Co.*, 839 N.Y.S.2d 474, 474 (N.Y. App. 2007)).

18 Attachment is a “drastic remedy” that may unfairly
19 prejudice defendants, particularly when requested *ex parte* at
20 the inception of litigation. *Plaintiff Funding Holding, Inc.*
21 *v. Carrera*, 2017 WL 7411183, at *2 (E.D.N.Y. Feb. 6, 2017)
22 (citing *Northeast United Corp. v. Lewis*, 26 N.Y.S.3d 810, 812
23 (N.Y. App. Div. 2016); *General Textile Printing & Processing*
24 *Corp. v. Expromptorg Int’l Corp.*, 862 F. Supp. 1070, 1073
25 (S.D.N.Y. 1994) (“Attachment is a harsh remedy, and should not

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1 be lightly granted by the court.”)). “[A]ttachment deprives the
2 defendant of the use and enjoyment of property at an extremely
3 embryonic stage of the litigation[,] . . . long before the
4 defendant’s liability to the plaintiff is established.” *Buy*
5 *This, Inc., v. MCI Worldcom Comms., Inc.*, 178 F. Supp. 2d 380,
6 383 (S.D.N.Y. 2001) (citation omitted). Thus, “[a]n order of
7 pre-judgment ‘attachment should issue only upon a showing that
8 drastic action is required for security purposes.’” *Adler v.*
9 *Solar Power, Inc.*, 2019 WL 2210661, at *3 (S.D.N.Y. May 22,
10 2019) (quoting *Bank of China, New York Branch v. NBM L.L.C.*,
11 192 F. Supp. 2d 183, 188 (S.D.N.Y. 2002)). The moving party
12 “bears a heavy burden in attempting to establish its right to
13 an attachment . . . because ‘New York attachment statutes are
14 construed strictly against those who seek to invoke the
15 remedy.’” *Rechnitz v. Kutner*, 2020 WL 3051498, at *6 (E.D.N.Y.
16 June 8, 2020) (quoting *Nat’l Audubon Soc., Inc. v. Sonopia*
17 *Corp.*, 2009 WL 636952, at *2 (S.D.N.Y. Mar. 6, 2009)).

18 IV. Discussion

19 I assume without holding that Plaintiffs have
20 satisfied the first requirement of Section 6212(a) – that there
21 is a cause of action. Their initial complaint was filed on the
22 same day as the application for the attachment. Defendants
23 have argued that many of the asserted causes of action are not
24 viable, but I need not resolve those issues in order to
25 evaluate the application here. Section 6212(a) requires that

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1 the amount demanded from a respondent exceed all counterclaims
2 known to a petitioner. N.Y. CPLR § 6212(a). Defendants have
3 not asserted any counterclaims against Plaintiffs at this time,
4 nor do they raise any arguments as to this element in their
5 opposition. Accordingly, I assume that this element is also
6 satisfied. Therefore, I will focus my Section 6212(a) analysis
7 on the remaining two requirements: that there exists statutory
8 grounds for the attachment, and that Plaintiffs can demonstrate
9 a likelihood of success on the merits.

10 a. Grounds for Attachment

11 A petitioner seeking confirmation of an attachment
12 order must demonstrate that a ground for attachment under N.Y.
13 CPLR § 6201 exists. See N.Y. CPLR 6212(a). Plaintiffs assert
14 that N.Y. CPLR § 6201(3) applies here. That section provides
15 that an order of attachment may be granted when “the defendant,
16 with intent to defraud his creditors or frustrate the
17 enforcement of a judgment that might be rendered in plaintiff’s
18 favor, has assigned, disposed of, encumbered or secreted
19 property, or removed it from the state or is about to do any of
20 these acts[.]”

21 “To determine whether attachment for security purposes
22 is justified, it is necessary to examine subsection (3) of
23 § 6201. Under CPLR § 6201(3), ‘it is incumbent upon
24 [plaintiff] to demonstrate that the defendant is acting with
25 intent to defraud’” *Philatelic Found. v. Kaplan*, 1986 WL 5629,

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1 at *4 (S.D.N.Y. May 9, 1986), abrogated on other grounds by
2 *Aramony v. United Way of Am.*, 969 F. Supp. 226 (S.D.N.Y. 1997);
3 see also *Computer Strategies v. Commodore Business Machines*,
4 105 A.D.2d 167, 172, 483 N.Y.S.2d 716, 721 (2d Dep't 1984)
5 (mere removal or assignment or other disposition of property
6 not grounds for attachment absent an actual showing of
7 fraudulent intent) reh'g denied, 110 A.D.2d 743, 488 N.Y.S.2d
8 616 (2d Dep't 1985). "'removal, assignment, or other
9 disposition of property is not a sufficient ground for
10 attachment; fraudulent intent must be proven, not simply
11 alleged or inferred, and the facts relied upon to prove it must
12 be fully set forth in the moving affidavits.'" *Encore Credit*
13 *Corp. v. LaMattina*, 2006 WL 148909, at *3 (E.D.N.Y. Jan. 18,
14 2006) (quoting *Abacus Fed. Sav. Bank v. Lim*, 8 A.D.3d 12, 778
15 N.Y.S.2d 145 (1st Dep't 2004)). Because "[f]raud is not lightly
16 inferred," Plaintiff's "moving papers must contain evidentiary
17 facts as opposed to conclusions proving the fraud." *Encore*
18 *Credit Corp.*, 2006 WL 148909, at *3; *Brastex Corp. v. Allen*
19 *Int'l, Inc.*, 702 F.2d 326, 331-32 (2d Cir. 1983). "Affidavits
20 containing allegations raising a mere suspicion of an intent to
21 defraud are insufficient." *Strategic Growth Int'l, Inc. v.*
22 *RemoteMDx, Inc.*, 2008 WL 4179235, at *8 (S.D.N.Y. Sept. 10,
23 2008). Rather, "[i]t must appear that such fraudulent intent
24 really exists in the defendant's mind." *Encore Credit Corp.*,
25 2006 WL 148909, at *3.

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1 “Because ‘fraudulent intent is rarely susceptible to
2 direct proof,’ courts in the Second Circuit have examined
3 whether allegedly suspicious transactions exhibit ‘badges of
4 fraud’ that give rise to a sufficient inference of intent.” *DLJ*
5 *Mortg. Cap., Inc. v. Kontogiannis*, 594 F. Supp. 2d 308, 320
6 (E.D.N.Y. 2009) (quoting *In re Kaiser*, 722 F.2d 1574, 1582 (2d
7 Cir. 1983)). “The existence of several badges of fraud can
8 constitute clear and convincing evidence of actual intent” to
9 defraud creditors. *In re MarketXT Holdings Corp.*, 376 B.R.
10 390, 405 (Bankr. S.D.N.Y. 2007) (citation omitted). Among the
11 badges that courts consider are:

12 “(1) [T]he lack or inadequacy of consideration; (2)
13 the family, friendship or close associate relationship between
14 the parties; (3) the retention of possession, benefit or use of
15 the property in question; (4) the financial condition of the
16 party sought to be charged both before and after the
17 transaction in question; (5) the existence or cumulative effect
18 of a pattern or series of transactions or course of conduct
19 after the
20 incurring of debt, onset of financial difficulties, or pendency
21 or threat of suits by creditors; and (6) the general chronology
22 of the events and transactions under inquiry.”

23 *CF 135 Flat LLC v. Triadou SPV N.A.*, 2016 WL 5945912,
24 at *10 (S.D.N.Y. June 24, 2016) (quoting *In re Kaiser*, 722 F.2d
25 at 1582-83). “While the presence or absence of any particular

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1 badges of fraud is not determinative in finding fraudulent
2 intent, 'the presence of multiple indicia will increase the
3 strength of the inference.'" *Allstate Ins. Co. v. Mirvis*,
4 2018 WL 4921631, at *5 (E.D.N.Y. Sept. 4, 2018) (citation
5 omitted).

6 Plaintiffs' application has failed to support a
7 sufficient inference of fraud. In their opening brief,
8 Plaintiffs conclude that this element is satisfied because
9 Defendants have engaged in ongoing fraud, have evaded arrest,
10 and illegally commingled and transferred business funds to
11 personal bank accounts, and therefore Defendants will continue
12 to act with the intent to defraud Plaintiffs to frustrate any
13 judgment that might be rendered in the Plaintiff's favor. See
14 Dkt. No. 5 at 11-12. Plaintiffs provided limited briefing to
15 support their argument, but the Court understands Plaintiffs'
16 arguments to rely on the following facts: Mr. Han moved to the
17 United States, he purchased two high-value properties without
18 financing one of them and put it up for sale, and there were
19 investigations into the defendant companies in China after Mr.
20 Han moved. These facts alone do not demonstrate that CPLR
21 § 6201(3) applies, particularly where Defendants have provided
22 a plausible explanation for the timing of those events and the
23 Rector Place apartment is no longer on the market.
24 Han Decl. ¶ 5.

25 Plaintiffs provide slightly more briefing in their

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1 reply and argue that Mr. Han's intent to defraud is
2 demonstrated by the false statements submitted to the Court in
3 his opposition. However, the evidence submitted by Plaintiffs
4 does not necessarily prove Mr. Han's statements are false. For
5 example, Plaintiffs argue that, because Defendant Han is in the
6 United States on a non-immigrant O-1 visa (which requires that
7 he be employed by a U.S. employer), he cannot be here "pursuing
8 business opportunities" as he claims. This argument does not
9 support Plaintiffs' position; the fact that Defendant Han
10 obtained a visa from a US employer supports the inference that
11 he came to the United States to pursue business opportunities.
12 And, that explanation makes logical sense, particularly in
13 light of the allegation by Plaintiffs that Mr. Han moved to the
14 United States at around the time that his company was rumored
15 to go public on the NYSE – another clear "business
16 opportunity." Plaintiffs further argue that based on the
17 timing of Mr. Han's move to the United States, it must have
18 been his intention to flee before the investigations in China
19 began because he departed just three months before the General
20 Manager of Nuoyuan Capital Management Company was arrested.
21 But as Plaintiffs have stated, China does not provide the
22 public access to records of ongoing investigation and Mr. Han
23 moved the year before. Plaintiffs further point to the China
24 Securities Regulatory Commission's penalty against Mr. Han for
25 insider trading as evidence that he fled. The document

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1 describing the penalty states that it was issued in 2020, two
2 years after Mr. Han had moved to the United States. Plaintiffs
3 have not provided any evidence that Mr. Han had advance notice
4 of the investigations, such that he would have had an incentive
5 to flee the country. And, as Defendants point out, Mr. Han
6 purchased the properties in New York using his own name, albeit
7 in one case through a separate investment vehicle. This
8 profoundly undermines Plaintiffs' arguments that he is trying
9 to hide Plaintiffs' funds or to secrete it outside of New York.
10 Instead, it appears that Mr. Han is investing in New York.
11 There is no evidence that he is secreting evidence outside of
12 New York or that he intends to do so.

13 Furthermore, one of the properties that Plaintiffs
14 seek to attach is co-owned by Ms. Feng. Plaintiffs have not
15 adequately demonstrated that Ms. Feng had an intent to defraud.
16 As the basis for their assertion that Ms. Feng cooperated with
17 Mr. Han to convert Plaintiffs' assets, Plaintiffs allege that
18 Ms. Feng and Mr. Han are in a romantic relationship. They do
19 not provide any additional information regarding Ms. Feng's
20 alleged intent to defraud investors that would support an order
21 of attachment.

22 Plainly, the evidence presented is not sufficient to
23 establish that the defendants have or are about to, dispose of
24 or remove property from New York State, as required by the
25 statute. Plaintiffs are required to demonstrate more than "a

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1 mere suspicion of an intent to defraud," and they failed to do
2 so here. *Strategic Growth Int'l, Inc. v. RemoteMDx, Inc.*,
3 2008 WL 4179235, at *8 (S.D.N.Y. Sept. 10, 2008). It is again,
4 important to emphasize that the burden in this context lies
5 with Plaintiffs, and that they must support their position with
6 evidence, not allegations. Plaintiffs have not presented
7 sufficient evidence that Defendants whose assets are sought to
8 be attached disposed of or secreted property from the state
9 with the intent to defraud or frustrate creditors, or that they
10 are about to do so. Based on the arguments made by Plaintiffs
11 and the evidence presented in support of their application,
12 the Court cannot conclude that the requirement for statutory
13 grounds for the attachment has been satisfied.

14 This alone is sufficient to deny Plaintiffs'
15 application. *Nat'l Audubon Soc., Inc. v. Sonopia Corp.*, 2009
16 WL 636952, at *4 (S.D.N.Y. Mar. 6, 2009). The Court will
17 nonetheless turn to a discussion of Plaintiffs' probability of
18 success on the merits, as that is a consideration here,
19 although, again, the denial of the attachment can be granted on
20 the basis that I just described alone.

21 b. Probability of Success on the Merits

22 "Probability of success on the merits for purposes of
23 an order of attachment requires that the moving party
24 demonstrate that it is more likely than not that it will
25 succeed on its claims and must show proof stronger than that

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1 required to make a prima facie case." *Musket Corp. v. PDVSA*
2 *Petroleo, S.A.*, 512 F. Supp. 2d 155, 160 (S.D.N.Y. 2007)
3 (citations omitted) (emphasis added); see also *DLJ Mortg.*
4 *Cap., Inc.*, 594 F. Supp. 2d at 319 (same). "The movant must
5 make that showing 'by affidavit and such other written evidence
6 as may be submitted.'" *Skyline Steel, LLC v. PilePro, LLC*,
7 2015 WL 5076695, at *3 (S.D.N.Y. Aug. 27, 2015) (quoting *Buy*
8 *This, Inc. v. MCI Worldcom Commc'ns, Inc.*, 178 F.Supp.2d 380,
9 382 (S.D.N.Y. 2001)). "In assessing whether a plaintiff can
10 show a probability of success on the merits, 'the court must
11 give the plaintiff the benefit of all the legitimate inferences
12 that can be drawn from the facts.'" *Silverman Partners, L.P.*
13 *v. First Bank*, 687 F. Supp. 2d 269, 293 (E.D.N.Y. 2010)
14 (quoting *Monteleone v. Leverage Grp.*, 2008 WL 4541124, at *6
15 (E.D.N.Y. Oct. 7, 2008)); see also *JSC Foreign Econ. Ass'n*
16 *Technostroyexport v. Int'l Dev. & Trade Servs., Inc.*, 306 F.
17 Supp. 2d 482, 485 (S.D.N.Y. 2004) (same).

18 Now, I am not going to discuss all of the various
19 bases that have been argued here. I will simply state that for
20 purposes of this decision that Plaintiffs have not shown a
21 probability of success on the merits for a number of reasons.
22 I will set aside for now the substantial arguments raised by
23 Defendants regarding whether or not the Court has personal
24 jurisdiction over these Defendants. There is a very
25 substantial series of questions related to those issues.

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1 Instead, I will focus briefly on other issues, beginning
2 briefly with the Defendants' intended arguments regarding the
3 effect of the arbitration provision.

4 As I have already described, Article 16 of the
5 Purchase Agreements as I understand it reads that:

6 "All disputes arising from the Agreement and related
7 to the Agreement should first be resolved through friendly
8 negotiation between the relevant parties. If the relevant
9 parties cannot resolve the matter through negotiation, the
10 matter shall be submitted to the Beijing Arbitration
11 Commission, and an award will be made in Beijing in accordance
12 with the then effective arbitration rules." Dkt. No. 21-7 at
13 7.

14 "Whether one can be bound by an arbitration clause is
15 usually determined by looking at generally accepted principles
16 of contract law." *Gold v. Deutsche Aktiengesellschaft*, 365
17 F.3d 144, 149 (2d Cir.2004); see also *Bell v. Cendant Corp.*,
18 293 F.3d 563, 566 (2d Cir.2002) ("[T]he ultimate question of
19 whether the parties agreed to arbitrate is determined by state
20 law."). Pursuant to these principles, "a party is bound by the
21 provisions of the contract that [s]he signs, unless [s]he can
22 show special circumstances that would relieve h[er] of such an
23 obligation." *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840,
24 845 (2d Cir. 1987).

25 Now, I'm not reaching a final conclusion regarding

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1 these issues. The documents are not governed by New York law,
2 but they appear on their face to mandate the arbitration of
3 matters arising in connection with these agreements in the
4 Beijing Arbitral Tribunal based on the evidence presented,
5 which is really very extremely limited, regarding the Chinese
6 Arbitral panel's asserted inability to take up this issue,
7 which is the only substantive basis that has been presented
8 here for why this arbitration provision cannot be enforced. I
9 have not been presented with enough to conclude that Plaintiffs
10 have a substantial or a probability of success on the merits
11 with respect to these claims. As counsel for Hengtai pointed
12 out, they are not the subject of any criminal proceedings.
13 Counsel for plaintiff has not pointed me to foreign law that
14 supports their argument. There is insufficient evidence for me
15 to conclude that this arbitral provision which would be
16 anything but fully enforced. Counsel for Defendants have
17 asserted on the record here that the Arbitral Tribunal's rules
18 dedicate issues of arbitrability to the arbitrator. I do not
19 have information on that point from counsel for Plaintiffs, so
20 I accept that proffer for these purposes. Given that, at this
21 point I can't concluded that Plaintiffs have established a
22 probability of success on the merits with respect to their
23 claims in this court because of the apparent strength of
24 Defendant's arguments related to the enforceability of the
25 arbitration clause. Again, I am not reaching an ultimate

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1 conclusion regarding this issue at this time. I am merely
2 evaluating the probability of success for purposes of
3 evaluating the request for attachment.

4
5 Again, I will not take up the substantial issues
6 regarding subject matter jurisdiction. Instead, I will talk
7 briefly about the anticipated motion to dismiss the federal
8 causes of action. The Defendants are seeking to dismiss the
9 RICO claim and the Securities Exchange Act claims. At this
10 point based on the evidence presented to the Court, I cannot
11 find Plaintiffs have demonstrated a probability of success on
12 the merits with respect to those claims, in large part because
13 there is very little - essentially no - evidence of any
14 territorial conduct that would bring this series of occurrences
15 within the scope of those statutes. Extraterritorial
16 application of RICO and the securities laws are clear issues
17 that have been discussed by the Supreme Court and Second
18 Circuit many times. I have not yet seen or heard arguments or
19 evidence from Plaintiffs that leads me to conclude that they
20 have a probability of success of showing that the underlying
21 transactions here have sufficient nexus to the United States.
22 I note that should those claims be dismissed, that the Court
23 does not have, it appears, subject matter jurisdiction over
24 this case if the federal claims were to go away. This also
25 leads me to conclude that Plaintiffs have not shown the burden

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1 of probability of success here.

2 Similarly, I will not address each of the - I'll call
3 it - "state law" claims because I simply observe that it is not
4 certain that these claims are governed by New York State law as
5 opposed to the applicable law of the relevant jurisdiction in
6 which the transactions or contracts were entered into or where
7 the relevant corporations are incorporated.

8 So, for those reasons I can conclude for these
9 purposes that Plaintiffs have not demonstrated a sufficient
10 probability of success on the merits, and, as a result, that
11 contributes to my conclusion that the order of attachment
12 should be denied.

13 Again, I emphasize that my evaluation of the
14 probability of success on the merits is limited to the
15 arguments and evidence presented here. I am not deciding now as
16 a matter of law that with certainty that these claims cannot
17 proceed. That is an issue that I will evaluate as we look at
18 these motions to dismiss. And it is to that topic that I will
19 now turn.

20 So, counsel for Defendants, other than counsel for
21 Hengtai, we've discussed the bases for the proposed motions,
22 which I understand to be a combination of motions to be brought
23 under Rule 12(b)(1) and 12(b)(6). When would you propose to
24 bring those motions?

25 MR. BOXER: Your Honor, it's Jeff Boxer speaking.

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1 Depending on the schedule set by the Court, we would anticipate
2 if we could have perhaps two additional weeks to prepare it,
3 then we would be ready to go forward.

4 THE COURT: Very good.

5 Counsel for Hengtai?

6 MR. SAVA: Yes, two weeks would be sufficient for us
7 since -- this is Matthew Sava.

8 THE COURT: Good. Thank you very much.

9 So the motions themselves will be due then on or around, let's
10 call it, April 14.

11 Counsel for Plaintiffs, the default rule for these
12 purposes is that the opposition would be due in about three
13 weeks. Is that sufficient time for you here?

14 MR. GILMER: So, I actually have a question first. In
15 your Rule D, you say if a motion to dismiss is filed, a
16 Plaintiff has a right to amend its pleadings within 21 days
17 pursuant to Rule 15(a)(1)(B). However, in this case since we
18 have already amended once as of right, I was not sure how to
19 interpret the rule, how it would work in this case. Would we
20 be permitted to amend our complaint once again prior to the
21 motion to dismiss would be heard?

22 THE COURT: So there are two threads of that that I
23 would like to deal with separately. First, Rule 15(a)(1)
24 provides a party the opportunity to amend their complaint once
25 as of right. If you've already burned up your amendment as of

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1 right prior to responding to the motion to dismiss, then my
2 individual rules do not give you another life. If you've used
3 your amendment as of right previously not in response to a
4 motions, my rules do not give rise to another, I'll call it,
5 bite at the apple. So, the rules will govern whether or not
6 you're entitled to amend the complaint again in response to the
7 motion to dismiss. My individual rules don't provided guidance
8 on that question.

9 The second question is whether you would have the
10 ability to amend the complaint prior to a motion to dismiss
11 being filed. On that front, we would be operating under Rule
12 15(a)(2), and any amendment would need to happen with either
13 leave of the Court or the consent of all parties. And if you
14 are requesting leave to amend the complaint, I would invite
15 conversation about that issue now.

16 Is that the request, counsel for Plaintiffs?

17 MR. GILMER: I do not at this moment have -- I would
18 certainly welcome an opportunity based off of our discussion to
19 have the chance to amend the complaint once again. I have not
20 previously discussed this with Mr. Wong. I don't know if he
21 has any opinion on this, if he is still present.

22 THE COURT: Thank you. Let me do this: I am going to
23 leave the motion schedule as I'm about to set it, and I would
24 ask that you do this: If you want to talk about a potential
25 amendment to the complaint prior to the motion to dismiss, the

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1 motion to dismiss will be due by the 14th. Any opposition will
2 be due no later than three weeks following service of the
3 motion. Any reply will be due no later than one week following
4 service of the opposition.

5 If you, counsel for Plaintiffs, wish to amend the
6 complaint prior to the filing of the motion, I invite you to
7 confer about the topic with lawyers for the Defendants. If the
8 parties are able to agree that an amendment is warranted, you
9 should write the Court and let me know that. If you all agree,
10 then the rules say I don't need to approve it. If you don't
11 agree, then you should let me know that you're seeking the
12 Court's leave to file an amended complaint.

13 Because I expect that the defendants will begin
14 working promptly on their motion, I'm going to ask that any
15 such conference happen no later than close of business
16 tomorrow, so that the Defendants don't expend unnecessary
17 energy. My expectation is that unless the parties let me know
18 by the end of the week that an amendment is anticipated, then
19 the schedule will remain as it is.

20 Good. Anything else from anyone before we adjourn
21 this conference?

22 First, counsel for Plaintiffs.

23 MR. GILMER: Nothing further, your Honor.

24 THE COURT: Good. Thank you.

25 Anything further, counsel for Hengtai?

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1 MR. SAVA: No thank you, your Honor.

2 THE COURT: Good. Thank you.

3 Counsel for the remaining defendants?

4 MR. BOXER: Jeff Boxer. Nothing further, your Honor.

5 Thank you.

6 THE COURT: Good. Thank you all. This proceeding is
7 adjourned.

8 (Adjourned)

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